On the courage to be wrong

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The debate on the Wissenschaftsrat-Report has quickly turned into one about the comparative advantages of German doctrinal vs. US interdisciplinary legal scholarship and education. This is not surprising because much of the Report reads like a recommendation to go further down the American path, while at the same time still taking doctrine seriously – very seriously indeed. In taking this 'middle path', the authors seek to take the best of what are two very different academic worlds. This effort is admirable, but I am skeptical about its prospects.

The attempt itself stems, I think, from a deeper dilemma that has haunted German-American debates for a while and has been discussed by Or Bassok on the ICON-Blog: While American scholars are interested in 'external' forces that drive law, their scholarship can easily become destructive, as Joseph Weiler mentioned at a recent German-American NYU workshop. Ulrich Haltern and Christoph Möllers have addressed this problem as the 'self-fulfilling prophecy' of American legal realism: that it destroys trust in law by exposing it as driven by external, non-legal forces. That the US Bar Association is now increasingly protesting the American approach is hence hardly accidental (see Ralf Michael's posting). The challenge, as many Germans and some American scholars see it, is how to avoid this destruction. Interdisciplinary research, in other words, is only good so long as it is useful to make normative and ultimately legal claims.

This task, however, is not only very difficult, but it also comes with a price to pay. This price is an increased risk of being considered unprofessional for dabbling in a field not your own and of being wrong.

These risks are perhaps lowest for interdisciplinary work involving ethics or political philosophy. Legal terms often refer to ethical and political concepts and it is therefore comparatively easy to frame them as legal arguments. There is little translation work that has to be done and therefore less of a risk to get things entirely wrong. Because this kind of argument also has a long historical pedigree, lawyers with this kind of approach are less likely to be considered unprofessional. This is, I think, the reason why most existing German interdisciplinary legal work builds on philosophy.

Things become quickly more difficult, however, with other disciplines whose languages are more foreign to us as lawyers. Not only is translation more difficult when we are dealing with descriptive rather than normative research in other fields. There is also a bigger problem with professionalism. German legal culture places a high emphasis on professional expertise that comes with a certain love for precision and nuance. Or in other words: If American legal scholars try first to be interesting, Germans want first to be right. It is because American try hard to be interesting that many smart German law students who study in the US enjoy it so much, as Rob Howse tells us. Conversely, however, the willingness and patience of many lawyers

to engage in very nuanced arguments about comparatively small points of law often makes Germans very good doctrinal scholars (see Ralf Michael's posting).

For German legal scholars, this emphasis on being right quickly becomes a problem for interdisciplinary research. German lawyers are not trained in other disciplines. Dabbling with some fascinating research in other fields therefore always carries high risks of both being and seeming unprofessional: We might not understand things well enough and make mistakes. And in our Weberian culture with its emphasis on expertise, being unprofessional is the ultimate sin. This Weberian culture is, of course, not frozen in time, as Howse rightly points out. Nevertheless, it is also not something we can change with a mere report. American legal scholars are better equipped to deal with interdisciplinary questions because they are more exposed to other disciplines in law school and study other subjects at college. They are also more willing to take risks, to not be constructive or precise as long as they say something original and interesting because their professional integrity is less likely to be questioned for it. German scholars faced with social science research in turn often behave much like turtles when danger approaches: they withdraw back into their legal shell.

If we therefore really want German scholars to do more interdisciplinary work, we need to be less afraid of making mistakes because we are drawing on fields we are not professionally trained in and we need to be more forgiving towards those who do. Similarly, if we want to hire foreigners at German law schools, we have to accept that this may mean that we can offer less in-depth education on the finer doctrinal points of German law to German law students preparing for state exams. Finally, if we want German scholars to engage in debates in English with their American and other international colleagues – as the Report does – it will not be enough to translate German texts into English. German scholars will also have to adopt a less technical writing style that may sometimes look unscientific to a more traditional German audience. This, *I* think, is well worth the price. But I suspect it is not one that many Germans legal professionals will be willing to pay.
